The petitioners contend that "resolution of the question presented is dispositive to the correctness of the court of appeals' decision." (Petition, 13). To the contrary, the question presented is not even implicated in the Eleventh Circuit's decision, much less dispositive. In fact, it is interesting to note that the petitioners devoted only three pages of argument in their initial brief in the Eleventh Circuit to the entire issue of the differential diagnosis evidence, and did not mention the issue at all in their reply brief. Because the petitioners have failed to establish that the decision below conflicts with any decision of this Court or another court of appeals, the Court should deny the petition.

II. The Petitioners' Differential Diagnosis Evidence Does Not Establish That Defective Fyfanon® Caused The Petitioners' Injuries.

Although the petitioners assert the importance of this Court's review to the resolution of this dispute, the petitioners have failed to identify any basis for prevailing in this case. The differential diagnosis testimony upon which the petitioners rely provides no evidence on the elements of the petitioners' claims. Not one of the physicians providing a differential diagnosis testified that the petitioners' injuries were caused by defective Fyfanon®. Even if differential diagnosis evidence, without more, could, in some cases, prove causation, the differential diagnosis evidence offered by the petitioners in this case falls short of the mark. The petition should be denied because the petitioners' differential diagnosis testimony provides no evidence that the Fyfanon® was defective or that the petitioners' injuries were caused by that defect.

The petitioners assert that the differential diagnosis testimony of Dr. William Meggs, Dr. Leonard Cosmo, and Dr. Terry Himes could establish that the petitioners' injuries were caused by defective Fyfanon®. Contrary to the petitioners' arguments, none of those experts offered any testimony establishing that the petitioners' injuries were caused by defective Fyfanon®.

Dr. Meggs performed a differential diagnosis on each of the petitioners except Michael Anolfo. Dr. Meggs admitted that, prior to reading Dr. Matson's report, he had no opinion that any of the petitioners' injuries were caused by exposure to Fyfanon® contaminated with excessive levels of isomalathion. (R-566-96). Dr. Cosmo likewise admitted that he could not say that it was more likely than not that the symptoms experienced by McFarland, Knierim, Des Autelles, and the Gavonis were caused by exposure to defective Fyfanon®. In fact, the doctor conceded that he could not rule out that those petitioners had simply suffered an allergic reaction, or a non-allergic irritative reaction, to the medfly spray. (R-564-140).[5] Finally, the petitioners contend that the differential diagnosis testimony of Dr. Terry Himes proved their injuries were caused by defective Fyfanon®.[6] Dr. Himes, however, offered only

---

[5] It is not enough that the experts suggest that the injuries are consistent with exposure to malathion. Malathion, a pesticide, is by definition toxic to certain species in certain doses The fact that people may feel ill after exposure to medfly spray of which malathion is one component is not, without more scientifically reliable evidence, sufficient by itself to establish that the petitioners' injuries were caused by any alleged ***defect*** in the Fyfanon®.

[6] The petitioners did not argue to the Eleventh Circuit that Dr. Himes's testimony proved causation. The petitioners, therefore, waived that argument.

an opinion relating to petitioner Courtney Anolfo. He was not Ms. Anolfo's treating physician, nor did he ever examine her. Dr. Himes relied on the opinion of Dr. Matson to conclude that the Fyfanon® was defective. Moreover, Dr. Himes conceded that he could not rule out that Courtney Anolfo's seizure disorder was caused by genetic factors or her treatment with the drug Ritalin, rather than exposure to defective Fyfanon®. (R-562-192, 196-198, 201). Thus, the testimony of Dr. Meggs, Dr. Cosmo, and Dr. Himes does not establish that the petitioners' injuries were caused by defective Fyfanon®. As the Eleventh Circuit recognized, the petitioners did not offer sufficient evidence to withstand summary judgment on their claims. Nothing in the petition filed with this Court casts any doubt on that conclusion.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

STACY D. BLANK
Counsel of Record
Florida Bar No. 772781
HOLLAND & KNIGHT LLP
Post Office Box 1288
Tampa, FL 33601
Phone: (813) 227-8500
Fax: (813) 229-0134

and

CHRISTOPHER G. KELLY
HOLLAND & KNIGHT LLP
195 Broadway – 24th Floor
New York, NY 10007
Phone: (212) 513-2000
Fax: (212) 385-9010 (fax)

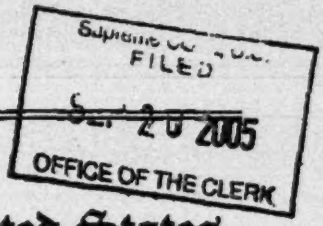
and

JOSEPH H. VARNER
Florida Bar No. 394904
KNOPIKVARNERMOORE
406 S. Morgan Street
Tampa, FL 33602
Phone: (813) 221-3131

Counsel for Respondents

(3)

No. 05-1



In The
Supreme Court of the United States

BARBARA MCFARLAND, individually and on behalf of all persons similarly situated in the State of Florida, *et al.*,

Petitioners,

v.

CHEMINOVA, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

JOHN G. CRABTREE
Counsel of Record
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
328 Crandon Boulevard
Suite 225
Key Biscayne, Florida 33149
Telephone (305) 361-3770

JOHN S. MILLS
TRACY S. CARLIN
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
865 May Street
Jacksonville, Florida 32204
Telephone (904) 350-0075

SHANNON MCLIN CARLYLE
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
La Plaza Grande
Professional Center
20 La Grande Boulevard
The Villages, Florida 32159
Telephone (352) 259-8852

GLADSTONE N. JONES, III
SPIRO J. VERRAS
KEVIN E. HUDDELL
JONES, VERRAS & FREIBERG, L.L.C.
601 Poydras Street, Suite 2655
New Orleans, Louisiana 70130
Telephone (504) 523-2500

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

REPLY TO BRIEF IN OPPOSITION

The Respondents (collectively, "Cheminova") do not dispute that there is a major federal circuit split on the main question presented in the Petition. Nor does Cheminova dispute that the split involves an important issue of federal law that is ripe for resolution by this Court. Instead, it opposes certiorari because it contends that this case does not fall within that split, and that—if the split was resolved in the Petitioners' favor—Cheminova would ultimately win on the facts. Neither is a basis to deny review.

I. The Eleventh Circuit's Opinion Falls Squarely in the Conflict.

The Petition describes a pre-existing 5-2 split among the circuits on the issue of whether an expert's opinion on causation is admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), when the opinion is based solely on differential diagnosis. Pet. at 6-8. Instead of disputing the conflict, Cheminova contends that the Eleventh Circuit did not address evidentiary admissibility (i.e., whether differential diagnosis testimony is admissible), but instead ruled on the different question of summary judgment sufficiency (i.e., whether differential diagnosis testimony is sufficient to defeat summary judgment). Resp. at 5-7.

Specifically, Cheminova argues that the Eleventh Circuit intended to hold that differential diagnosis is admissible but "notwithstanding its admissibility under *Daubert*, differential diagnosis evidence, standing alone and in the absence of any other evidence establishing causation, is nonetheless insufficient to defeat a motion for

summary judgment on the issue of causation." Resp. at 6. Cheminova tells this Court, "Even a cursory reading of the Eleventh Circuit's opinion in this case . . . reveals that the Eleventh Circuit did not, as the petitioners suggest, rule that differential diagnosis is not sufficiently reliable to be admissible." Resp. at 5. In truth, only a cursory reading of the Eleventh Circuit's opinion would allow that conclusion. As explained in the Petition, the Eleventh Circuit did enter the fray over whether differential diagnosis alone is legally sufficient to be admissible as evidence of causation. Pet. at 11-13.

The Eleventh Circuit never held that an expert's opinion of causation can satisfy *Daubert* if it is based solely on differential diagnosis. Cheminova argues that the Eleventh Circuit implicitly found the testimony to be admissible because the court of appeals stated that "numerous courts have found differential diagnosis to be sufficiently reliable to be admissible under *Daubert*" and cited the Fourth Circuit's decision in *Westberry v. Gislaved Gummi AB*, 178 F.3d 257 (CA4 1999). Resp. at 5-6. In a footnote, Cheminova contends that the Eleventh Circuit made a "favorable citation" to the Fourth Circuit's decision in *Westberry*. Resp. at 6 n.4.

Read in context, however, the Eleventh Circuit's reference to "numerous federal courts" in general and the Fourth Circuit in *Westberry* in particular is a citation of contrary, not favorable authority. The quoted language is a clause prefaced by the Eleventh Circuit with the word "while" and followed by a statement that the Eleventh Circuit takes the contrary approach:

> *While* numerous federal courts have found differential diagnosis sufficiently reliable to be admissible under *Daubert*, *see, e.g.*, *Westberry* . . . ,

> *we have found* in the context of summary judgment that differential diagnosis evidence by itself does not suffice for proof of causation. *See Rider* [*v. Sandoz Pharm. Corp.*, 295 F.3d 1184, 1199 (CA11 2002)] (finding case reports containing differential diagnosis insufficient to prove causation without further evidentiary support).

Pet. at 17a. The sentence structure itself puts the Eleventh Circuit's "we" in contrast to the referenced "numerous federal courts." The placement of the citations further illustrates the Eleventh Circuit's view that it is precluded from following *Westberry* by its earlier holding in *Rider*. Thus, the Eleventh Circuit's opinion cannot be read to hold that differential diagnosis testimony is admissible to prove causation.

The fact that this case arose from a summary judgment ruling, instead of a pure evidentiary ruling does not change this. Indeed, *Daubert* itself arose in the context of a summary judgment ruling, not an evidentiary ruling. The district court in that case had held that "the animal-cell studies, live-animal studies, and chemical-structure analyses on which petitioner had relied *could not raise by themselves a reasonably disputable jury issue regarding causation.*" *Daubert*, 509 U.S. at 584 (emphasis added). Even though the opinion below in that case dealt with summary judgment sufficiency on the issue of causation (as does this case), this Court granted certiorari "in light of sharp divisions among the courts regarding the *proper standard for the admission of expert testimony.*" *Id.* at 584 (emphasis added).

Finally, Cheminova misleadingly suggests that the cases on which the Petitioners rely to establish conflict did not involve a summary judgment determination like this

case. *See* Resp. at 6 ("All of the cases cited by the petitioners to demonstrate conflict involve the issue of whether differential diagnosis evidence is admissible under *Daubert*."). To the contrary, the very first case cited by the Petitioners, *Kannankeril v. Terminx Int'l, Inc.*, 128 F.3d 802 (CA3 1997), arose in the same procedural posture. Pet. at 7. The district court granted the defendant summary judgment because the plaintiff only offered differential diagnosis testimony. *Id.* at 804, 809. The Third Circuit reversed because it found this testimony to be admissible. *Id.* at 804.

Kennedy v. Collagen Corp., 161 F.3d 1226 (CA9 1998), *cert. denied*, 526 U.S. 1099 (1999), and *Brown v. Southeastern Pennsylvania Transportation Authority (In re Paoli Railroad Yard PCB Litigation)*, 35 F.3d 717 (CA3 1994), which were also cited in the Petition, Pet. at 7-8, also arose in the identical, summary judgment posture.

The Eleventh Circuit's opinion therefore falls clearly within the admitted circuit split.

II. That Cheminova Believes It Would Prevail on the Merits Does Not Make This Case Less Worthy of Review.

The only other argument raised in opposition to certiorari is Cheminova's argument that the Court should deny certiorari because Cheminova—supposedly—would win on the facts if the Petitioners prevail on the circuit split question before the Court. Resp. at 7-9. The argument relies heavily on facts outside the Eleventh Circuit's opinion, and construes the record in the light most favorable to Cheminova—though this is an appeal from a summary judgment order in its favor.

The Petitioners believe that they will prevail on the facts if they prevail on the law. Cheminova believes otherwise. That factual dispute is hardly a basis to deny review.

Respectfully submitted,

JOHN G. CRABTREE
Counsel of Record
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
328 Crandon Boulevard
Suite 225
Key Biscayne, Florida 33149
Telephone (305) 361-3770

JOHN S. MILLS
TRACY S. CARLIN
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
865 May Street
Jacksonville, Florida 32204
Telephone (904) 350-0075

SHANNON MCLIN CARLYLE
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
La Plaza Grande
Professional Center
20 La Grande Boulevard
The Villages, Florida 32159
Telephone (352) 259-8852

GLADSTONE N. JONES, III
SPIRO J. VERRAS
KEVIN E. HUDDELL
JONES, VERRAS & FREIBERG, L.L.C.
601 Poydras Street, Suite 2655
New Orleans, Louisiana 70130
Telephone (504) 523-2500

Counsel for Petitioners